Office - Supreme Court, U. S.
FILED
APR 16 1945
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 1169

THE MASSMAN CONSTRUCTION COMPANY,
Petitioner,

vs.

THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS AND BRIEF IN SUPPORT THEREOF.

PHIL D. MORELOCK,
TEMPLE W. SEAY,
Counsel for Petitioner.

INDEX

Subject Index

	Page
Petition for writ of certiorari	1
Opinion below	2
Jurisdiction	2
Question presented	2
Statement of case	3
Specification of errors to be urged	8
Reasons for granting the writ	9
Conclusion	10
Brief in support of petition	11
I. Opinion below	11
II. Statement of case	11
III. Argument	11
IV. Conclusion	25

Table of Authorities

Cases:

Board of School Commissioner of City of Indianapolis v. *Bender*, 36 Ind. App. 164	19
Burnes et al. v. *Burnes et al.*, 137 Fed. 781	12
Columbian Nat. Life Ins. Co. v. *Black*, 35 Fed. (2d) 571.	12
Cramp and Sons Ship and Engine Building Company v. *United States*, 239 U. S. 221	12
Dougherty and M. H. Ogden, Trading as Ogden and Dougherty v. *United States*, No. 45856 (unreported)	14
Dunn v. *P. D. O'Mara*, 70 Ill. App. 609	21
Harran v. *Foley*, 62 Wis. 584, 22 N. W. 837	23
Hazeltine Research Corporation et al. v. *Freed-Eisemann Radio Corporation*, 3 F. (2d) 172	12
Hearne v. *Marine Ins. Co.*, 20 Wall. 488	15
Hygienic Fibre Co. v. *The United States*, 59 C. Cls. 598	23
Long v. *Inhabitants of Athol*, 196 Mass. 497, 82 N. E. 665	23
Moffett, Hodgkins, etc. Co. v. *Rochester*, 178 U. S. 373	15
Moody v. *Smoot Adv. Co.*, 98 W. Va. 261, 126 S. E. 919.	13
Poole Engineering and Machine Company, 58 C. Cls. 9	23

Page

Rappoli Company, Inc. v. *The United States*, 98 C. Cls. 499 24
Ratan v. *Clark*, 220 Mich. 493, 190 N. W. 244 13
Scott v. *Spurr*, 169 Ky. 575, 184 S. W. 866 13
Simmons Creek Coal Company v. *Doran*, 142 U. S. 417. 12
Southern Surety Co. v. *United States Cast Iron Pipe & Foundry Co.*, 13 Fed. (2d) 833 12
United States v. *Milliken Imprinting Co.*, 202 U. S. 168. 12
Wasatch Min. Co. v. *Crescent Min. Co.*, 148 U. S. 293.. 13
Welles v. *Yates*, 44 N. Y. 525 13
Westinghouse Electric & Mfg. Co. v. *Tri City Radio Electric Supply Co. et al.*, 23 Fed. (2d) 628 12
Wichita Petroleum Co. et al. v. *Winant et al.*, 295 Fed. 67. 12

TEXT REFERENCES

Equity Jurisprudence, Section 1381, Mr. Justice Story. 23
Restatement of the Law of Contracts, Sec. 503 14
Williston on Contracts, Vol. V. Rev. Ed., Paragraph 1548. 12

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 1169

THE MASSMAN CONSTRUCTION COMPANY,
Petitioner,

vs.

THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, The Massman Construction Company, a Missouri Corporation, through its attorneys, respectfully prays that a writ of certiorari issue to review the judgment (judgment dismissing petitioner's petition entered January 8, 1945, R. 63; order overruling petitioner's motion for new trial entered March 5, 1945, R. 63) of the Court of Claims of the United States in a suit there entitled "The Massman Construction Company, a corporation, v. The United States, No. 45765," and in support of its petition shows:

Opinion Below

The opinion of the Court of Claims No. 45765 (R. 57) which has not been reported, Mr. Justice Littleton dissenting.

Jurisdiction

The judgment of the Court of Claims was entered on January 8, 1945 (R. 63). The jurisdiction of this Court is invoked under Paragraph 3(b) of the Act of February 13, 1925, c. 229, 43 Stat. 936, 939, Title 28, U. S. C., paragraph 288, as amended by the Act of May 22, 1939, c. 140, 53 Stat. 752.

Question Presented

The basis question is whether the petitioner is entitled to recover $88,000 for the use and rental of equipment under a contract with the respondent, which sum was inadvertently and mistakenly omitted from its bid and contract, the work under the contract having been satisfactorily performed, and the respondent having enjoyed the full use of such equipment in the reasonable sum of the amount claimed.

The preliminary question is whether the petitioner is entitled, in equity, to the reformation or rescission of the contract entered into with the respondent requiring the use of valuable equipment because of mutual mistake of fact, or mistake of fact on the part of the petitioner and inequitable conduct on the part of the respondent in its failure to recognize and correct that mistake when it was called to its attention, or, in the alternative, to have rejected the petitioner's bid, as requested shortly after the bids were opened and long prior to the award, such contract having been entered into without the inclusion of the $88,000 under written protest of the petitioner.

The facts as found by the Court below, and about which there has never been any substantial dispute between the parties, have been fully and fairly set forth by the Court as its Special Findings of Fact (R. 43-57), which will hereafter be summarized in our supporting brief.

Statement of the Case

Petitioner, a Missouri corporation, has been engaged in the general contracting business for a great number of years, during the past fifteen of which its work has been confined largely to contracts with the Corps of Engineers, United States Army, aggregating some $60,000,000, all of which have been performed without substantial controversy (R. 43).

In October, 1940, the United States Engineer Office, New Orleans, Louisiana, advertised for bids to be opened at 2:00 P. M., November 7, 1940, for repairing the existing rubble mound east jetty at Calcasieu Pass, Louisiana. The estimated quantities required under the contract were 48,000 tons of riprap stone, 102,000 tons of core stone and 7,000 tons of cover stone. The work involved first the laying of a mat of riprap stone on the bed of and extending into the Gulf of Mexico and building a core of stone on that mat upward to the low-water level and placing the cover stone over the core (R. 43-44).

The petitioner's officers surveyed the requirements of the project, especially with respect to the kind, suitability and availability of equipment to be used, which they discussed, also the rental charges therefor, although the amount thereof was left to the judgment of the estimator, a trusted employee and a man of broad experience in such matters, who was designated to and who did proceed to New Orleans to prepare the estimate and bid (R. 45).

The petitioner's estimator, so designated, arrived in New Orleans on the morning of November 6, 1940, and began the task of gathering data for his estimate and the preparation thereof (R. 46). Because there were several alternates involved, there were several methods of figuring the bid. He worked steadily throughout that day—with only time out for meals—collecting the necessary information, interviewing, and making his calculations. Since a major factor in the cost was the type and amount of equipment, he first calculated the equipment charge on the customary estimate sheet (R. 46), arriving at a total, as therein itemized, of $88,000 for rental and use of tow boats, barges and other equipment (R. 46). On a second estimate sheet he then prepared the labor costs itemized thereon (R. 47) of placing the stone, together with cost of supervision. On a third sheet he prepared the labor costs of unloading and towing, also itemized therein (R. 48).[1]

The estimate sheets were completed at about 1:00 A. M., November 7, and a varied assortment of papers, with the three estimate sheets, were gathered together and placed in a brief case, leaving summarization and preparation of the bid for the morning's work (R. 48). The Court below found that

> "in removing the papers from his brief case, (the estimator) inadvertently failed to remove the sheet upon which he had determined the equipment charge, and prepared the summary for the purpose of his bid on a fourth sheet by using the second and third sheets

[1] It will be seen from the itemization on the second and third sheets that there was no amount even resembling the cost of use and rental of equipment, also at R. 49-50 the two major items of cost entering into the contract were labor and equipment, labor constituting the larger of the two items.

but without including therein any charge for equipment as shown on the first sheet" (R. 48, 49).

His summarization aggregated the proposed bid at $367,800,

"308,000 is made up of salaries, wages, and other expenses as outlined on the second and third sheets,"

the remainder of $59,800 being the "expected profit" (R. 49).

The estimator then prepared and submitted a bid form, bidding the said erroneous figure of $367,800 (R. 49) and although no amount was included therefor, the estimator

"listed the plant to be used on the work as one twenty-ton whirley, one fifteen-ton derrick barge, and for the remainder of the equipment stated generally: 'necessary number of steel barges and towboats and other equipment as required.' " (R. 49.)

"A charge for equipment to be used on this job was one of the elements of cost which should have been included in the preparation of the estimates for the bid," (R. 49-50) and the equipment set forth in the estimate sheet which was prepared by the estimator

"but was not considered by him in preparing the plaintiff's bid, was reasonable and necessary for the prosecution of the proposed project and the proposed charges therefor contemplating the use of its own equipment were reasonable and proper." (R. 50.)

The cost of renting such equipment instead of using its own equipment would have been substantially in excess of the $88,000 used by the estimator on his estimate sheet (R. 50).

The estimator duly filed his bid, together with bond in the amount of $200,000, and shortly thereafter the bids were opened and read in his presence and in the presence

of the other bidders, together with the Government's estimated cost, which were as follows:

Massman Construction Co.	$367,800.00
Estimated Government Cost	453,601.00
Badgett Construction Co.	620,400.00
D. M. Picton & Co., Inc.	798,600.00
W. Horace Williams Co.	935,000.00

(R. 50)

Immediately after the bids were opened, the estimator, noting the wide disparity in the bids read, having become concerned over the correctness of his bid, communicated with his employer in Kansas City and expressed his concern, the employer also expressing concern after having learned of the prevailing bids, and the estimator was instructed to check his figures, which he had already done and which he did thereafter on various occasions prior to actually locating the mistake, but, imbued as he was with the fact that he had calculated the equipment item first, dismissed this as the possible mistake (R. 50-53).

The estimator first met with his employers at their office on November 18, 1940, at which time inquiry was made of him what equipment he intended to use, and upon making a check of the brief case which he had used in New Orleans, he located the missing estimate sheet in a separate compartment of his brief case, which is the missing estimate sheet hereinbefore referred to as showing the estimated equipment cost of $88,000 (R. 52-53). Thereupon, after seeking the advice of counsel, on November 20, 1940, the petitioner notified the United States Engineer Office at New Orleans, Louisiana, of the mistake (which was approximately a month prior to the award hereafter referred to), and enclosed with that notification a copy of the estimate

sheet as prepared, showing the $88,000, requesting that the said amount be added to its bid "before the contract is awarded", or, in the alternative, "that our bid be rejected, and our bid bond released without penalty" (R. 53). Under date of December 18, 1940, the plaintiff was summarily advised that its bid in the amount of $367,800 was accepted, with the following comment:

> "Reference is made to your letter of November 20, 1940, in which you alleged error in your bid under Invitation No. 614-41-125. You are informed that after due consideration your request for permission to change your bid is denied. You are advised that you have the right to file a claim with the District Engineer for submission through channels to the Comptroller General for further consideration. If you desire to exercise your rights further in this regard, it is suggested that you submit your claim promptly. You are further advised that any action that may be taken on a submitted claim will not in any way affect the requirements for normal procedure under the contract." (R. 54.)

and the contract and bond were enclosed with that letter (R. 54).

Although declination was considered, the petitioner decided to enter into the contract, after weighing the dire effect of forfeiture of its bond and the effect upon its relations with its principal customer, The United States Government, and confronted with the mandate contained in the acceptance letter above, and being confident that the filing of a claim, as suggested, would ultimately result in settlement. Accordingly, on or about December 28, 1940, the petitioner executed the contract which it forwarded to the District Engineer with the requisite bond for $200,000, and

with a written protest and letter to the Comptroller General, making claim for the amount in question, such protest reading:

> "This contract and the bond securing its performance are signed by the contractor, The Massman Construction Company, under protest, said contractor hereby reserving all of its rights in the matter and asking for relief on account of error and mistake in its bid due to the inadvertent omission of charge for use and rental of equipment; due notice of which error and omission was given on November 20, 1940, by the contractor to the District Engineer, United States Engineer Office, New Orleans, Louisiana, before acceptance thereof was made." (R. 55)

The contract, with protest, was not fully consummated, according to the terms of the contract, until approved by the Division Engineer, i.e., January 8, 1942. (R. 39 and 55)

The letter to the Comptroller General forwarded with the executed contract and bond, to which was attached the evidence in support of the petitioner's claim for $88,000, stated:

> "WHEREFORE, The Massman Construction Company prays that relief be given it in this matter by allowing it the reasonable rental value of said equipment so inadvertently overlooked in this bid, for the reason that it would be unfair and unjust for the Government to avail itself of the use of same without compensating the contractor therefor." (R. 55)

The petitioner's claim was denied by the Comptroller General, September 9, 1941, and the petitioner filed its petition in the Court below on October 15, 1942. (R. 1)

Specification of Errors to Be Urged

The Court of Claims erred:

1. In that it seemingly applied strict legal principles in its determination and failed to give effect to the equitable

principles governing the reformation and rescission of contracts containing bona fide mistakes.

2. In holding that, although under its own Special Findings of Fact there was an inadvertent mistake in the petitioner's bid by the omission of $88,000 therefrom for use and rental of equipment, the petitioner had knowledge of that mistake at the time it entered into the contract with the respondent, under written protest, and without the inclusion of the said $88,000 therein, it had cured the mistake, therefore there was no mistake in its contract.

3. In its conclusion that the petitioner's contract was not based upon mistake, as a *matter of law*, which is contrary to its Special Findings of Fact when considered in the light of *equitable principles* laid down and followed by this and other Courts in like or similar matters.

4. In deciding that the plaintiff was not entitled to recover, and in dismissing its petition and rendering judgment against the plaintiff for costs.

Reasons for Granting the Writ

We submit that the question presented is of general importance at the present time in view of the vast number of contracts that have been entered into by contractors throughout the United States with the United States in the present emergency; that the Court of Claims has decided an important question of general law and that its decision is untenable and in conflict with the weight of authority and with the decisions of this and other Courts, that the Court of Claims has so far departed from the accepted and usual course of judicial proceedings and principles of equity as to call for an exercise of this Court's power of supervision, and that since there is no other appeal from the action of that Court, failure to grant this writ and to lay down the correct equitable principles governing this and similar

cases to follow in that and other Courts will result in irreparable hardship to this petitioner and perpetuate confusion in the adjudication of such future litigation.

Unless this writ is granted and the judgment of the Court of Claims is reversed, the respondent will have enjoyed the use and benefit of valuable machinery and equipment of the petitioner, and the petitioner will have suffered damages by failure to have received due compensation therefor, which amount, $88,000, was found by the Court below to be a reasonable charge therefor.

Finally, we respectfully submit that in determining whether this writ should be granted, equitable considerations should be applied to the end that "equity will not suffer a wrong to go without a remedy".

In the determination of the issuance of this writ, the petitioner respectfully requests the Court to give due consideration to the fact that the decision of the Court below was by a divided Court, Mr. Justice Littleton dissenting.

Conclusion

Wherefore, it is respectfully submitted that this petition for a writ of certiorari to review the said judgment and order of the Court of Claims of the United States should be granted.

(Sgnd.) PHIL D. MORELOCK,
902 Bowen Building,
Washington 5, D. C.
(Sgnd.) TEMPLE W. SEAY,
902 Bowen Building,
Washington 5, D. C.
Attorneys for Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 1169

THE MASSMAN CONSTRUCTION COMPANY,

Petitioner,

vs.

THE UNITED STATES

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS

I. Opinion Below

The petition seeks a writ directed to the Court of Claims of the United States, to review a judgment rendered by that Court in the action there entitled "The Massman Construction Company v. The United States of America." (R. 63)

II. Statement of the Case

A full statement of the facts is found in the petition beginning at page three and ending at page eight, which in the interest of brevity will not be repeated here.

III. Argument.

The Court below is empowered to grant the relief here sought through the exercise of its equitable jurisdiction.

United States v. *Milliken Imprinting Co.*, 202 U. S. 168, and *William Cramp and Sons Ship and Engine Building Company* v. *United States*, 239 U. S. 221.

The rule respecting reformation of instruments has been broadly stated and applied. Its singular purpose is to apply equitable principles to the end that there may be no unjust enrichment on the one hand, and no irreparable damage on the other. Before reformation may be availed of, the instrument itself must fail to express the agreement of the parties, either because of mutual mistake or mistake, inadvertence, or accident on the one side and fraud or inequitable conduct on the other. *Hazeltine Research Corporation et al.* v. *Freed-Eisemann Radio Corporation*, 3 F. (2d) 172; *Wichita Petroleum Co. et al.* v. *Winant et al.*, 295 Fed. 67; *Burnes et al.* v. *Burnes et al.*, 137 Fed. 781. However, if the instrument does fail to express the real agreement or transaction due to either mutual mistake or to mistake, inadvertence, or accident on the one side and fraud or inequitable conduct on the other, and reformation is essential to give complete legal effect to the instrument, it will be allowed. *Columbian Nat. Life Ins. Co.* v. *Black*, 35 Fed. (2d) 571; *Westinghouse Electric & Mfg. Co.* v. *Tri-City Radio Electric Supply Co. et al.*, 23 Fed. (2d) 628; *Southern Surety Co.* v. *United States Cast Iron Pipe & Foundry Co.*, 13 Fed. (2d) 833. The abbreviated rule is stated in *Simmons Creek Coal Company* v. *Doran*, 142 U. S. 417:

> "The jurisdiction of equity to reform written instruments, where there is a mutual mistake, or mistake on one side and fraud or inequitable conduct on the other, is undoubted * * *"

Williston on Contracts, Vol. V, Rev. Ed., Paragraph 1548, says:

> "Knowledge by one party of the other's mistake regarding the expression of the contract is equivalent to

> mutual mistake. Thus if one party *before the execution of the instrument* knew of or discovered the error in it, reformation will be allowed against him though the mistake is not strictly mutual",

citing among others *Columbian Nat. Life Ins. Co.* v. *Black*, *supra; Wasatch Min. Co.* v. *Crescent Min. Co.*, 148 U. S. 293; *Scott* v. *Spurr*, 169 Ky. 575, 184 S. W. 866; *Ratan* v. *Clark*, 220 Mich. 493, 190 N. W. 244; *Welles* v. *Yates*, 44 N. Y. 525; *Moody* v. *Smoot Adv. Co.*, 98 W. Va. 261, 126 S. E. 919. "Knowledge" by the respondent of the petitioner's mistake here was "equivalent to a mutual mistake" under that rule—not a disqualification, from equity, as the Court below held.

Although clearly conceding by the adopted Findings that a mistake was made, Mr. Justice Madden, below, held that because the petitioner had knowledge of the mistake at the time it entered into the contract, there was no mistake, or, in effect, that the petitioner had, by entering into the contract, waived the mistake, notwithstanding the contract was signed under written protest, and primarily because the petitioner realized that its failure to do so would work a forfeiture of its bid bond. Mr. Justice Madden says:

> "*At the time the contract was awarded to the plaintiff, pursuant to its bid, and at the time it signed the contract, the plaintiff was not mistaken.* It had become aware of the mistake in its bid, and faced the problem of whether it was willing to sign a contract for the figure which it had, by mistake since discovered, bid. The Government was also aware of the plaintiff's claim that it had made a mistake in its bid. There was not, then, at the time of signing the contract, any lack of knowledge, either mutual or unilateral, which caused either of them to make the contract which they did make, when in fact they intended to make a different contract." (Italics supplied) (R. 60).

This language of the Court is difficult of understanding—since knowledge of a mistake would be indispensable to its correction—especially in view of the attitude of that Court in *Edwin Dougherty and M. H. Ogden, Trading as Ogden and Dougherty* v. *United States,* No. 45856, decided October 2, 1944, which has not been reported, a case on all fours except that there the plaintiff had knowledge of the mistake at the time of entering into the contract, *but failed to impart that knowledge to the Government,* which the Court said was fatal, citing the illustration of the rule in Section 503 of the *Restatement of the Law of Contracts,* as dispositive, which reads:

> "A, in answer to an advertisement of B for bids for the construction of a building according to stated specifications, sends B a bid of $50,000. B accepts the bid. A, in the calculation that he makes prior to submitting his bid, fails to take into account an item of construction that will cost $5,000. *If B knows, or because of the amount of the bid or otherwise, has reason to know that A is acting under a mistake, the contract is voidable by A, otherwise not.*" (Italics supplied.)

Here the petitioner not only had knowledge of the error, but it supplied the other essential, namely, it imparted that knowledge to the other contracting party. The Court below did not say in the *Dougherty* case, as it did here, that plaintiff had knowledge of the mistake, therefore, there was no mistake; it simply said that plaintiff failed to impart that knowledge (as the petitioner did here) hence, relief was denied. Irrespective of the notice which was given, the respondent should have suspected, at least, because of the disparity in bids, that a mistake had been made, petitioner's bid having been $252,600 lower than the next lowest bid, and $85,801 less than the Government's own estimate, the latter of which would, of course, exclude any element of profit.

Clearly, the bid and the contract which followed wholly

ailed to express, by reason of the mistake, the intention of he petitioner, and, indeed, it is logical to say, the intention f the respondent. It is obvious, from the facts, that the etitioner fully recognized and intended, from the outset, hat equipment would be indispensable to the prosecution f the work; that the respondent also knew and fully ex- ected and intended that such equipment would be used; hat the petitioner fully expected and intended that it should e compensated for the use of that equipment and, we have right to assume, we believe, that the respondent also xpected to make just payment therefor, thereby forming he foundation for reformation in order to express the true ntention of the parties not set forth in the written instru- ent. It would seem that the Court's ruling below is that he petitioner had, in effect, waived the mistake by having ntered into the contract with knowledge thereof, completely gnoring the fact that the contract was executed under ritten protest, thereby showing that the petitioner had ever intended to give up its right to just compensation for he use of its equipment, for which it is still seeking redress efore this Court.

The decision of the Court below is in conflict with the prin- iples set forth above and as laid down by this Court in learne v. *Marine Ins. Co.*, 20 Wall. 488, and *Moffett, Hodg- ins, etc. Co.* v. *Rochester*, 178 U. S. 373. In the latter case, he action grew out of certain errors in bids submitted by the omplainant for the making of certain improvements for the ity of Rochester, for which the claimant brought a bill in he lower Court, praying reformation of the bids to con- orm to the intention in making them, or their rescission. The lower Court sustained the bill of the complainant and ranted relief, the decision of which was reversed by the ourt of Appeals; and this Court, in its decision, reversed he Court of Appeals, thereby affirming the lower Court.

There the City of Rochester gave notice to contractors that proposals would be received at a stated time for the doing of certain construction work, necessitating two separate contracts, referred to by the Court as Contracts Nos. 1 and 2. The complainant intended to bid 70¢ per cubic yard for certain excavation work in connection with the proposals, which the Court found was "a fair and reasonable price for the work", and that sum was inserted in one of the proposals, but in one of the other proposals, as the Court found, "by accident and mistake" 50¢ was inserted. Also, the defendant's engineer estimated the quantity of excavation under another item at 2,000 cubic yards for which the intended charge was $15.00 per cubic yard, "which was a fair and reasonable charge". The Court found that "In haste and confusion" the engineer "who is extremely near-sighted", in transcribing his figures, by accident and mistake, inserted the sum of $1.50 per cubic yard. A bid bond was required, which was executed by the complainant. The complainant was led to believe that the two operations, although separately described, constituted a continuous piece of work and that any person bidding upon both sections, whose bid was lower in the aggregate for the same work, should be awarded the contract. The bids, as so prepared, were duly filed with the executive board of the City of Rochester and were finally opened in the presence of the complainant's agent. The Court reviewed the amounts of the bids of the other contractors as compared with those of the claimant and stated that its aggregate bids were "considerably less than the aggregate of any other contractor". The Court found that,

> "In order to take an improper and unconscionable advantage of complainant and the clerical errors made by it, the executive board on the 10th of January, 1893,

notified complainant that the defendants intended to enter into a contract for the work of Contract No. 1,"

ith another contractor,

"although complainant's proposals for the work on both contracts were the lowest in the aggregate for the entire work contemplated."

Before any official action had been taken with respect to etting the contracts, complainant protested against the ivision of the proposals and letting of the work on Con- racts Nos. 1 and 2 separately, and insisted that the defend- nts were bound to enter into a contract with it for the ntire work described in both contracts or none at all, and nformed the defendants of the clerical errors and requested hat they be corrected. It further demanded the contract or both sections of the proposals *at the correct prices* "or hat it be permitted to withdraw its proposals". The Court ound that,

"On the 12th of January, 1893, the executive board acting in bad faith and to take an unfair and unconscionable advantage of the clerical errors which had been committed, * * *"

dopted certain resolutions pertaining to action for com- elling the complainant to carry out its proposals, about hich the Court said,

"The said threatened action was contrary to good conscience, the contents of the proposals and the rights of complainant, and, unless restrained, would cause it irreparable injury, for which there was no adequate remedy at law."

he lower Court entered a decree adjudging the proposals f the claimant "rescinded, canceled, and declared null,

void, and of no effect". The Circuit Court of Appeals re
versed the decision of the lower Court with instructions t
dismiss the bill, although both Courts, as Mr. Justice Mc
Kenna remarked, agreed that "there was a mistake". Th
Circuit Court of Appeals based its decision upon the groun
that there was a "negligent omission" with respect t
which Mr. Justice McKenna remarked,

> "We do not think the negligence was sufficient to pre
> clude a claim for relief if the mistakes justified it."

and this Court thereupon set forth the following principles
being its own language in *Hearne* v. *Marine Ins. Co., supra*
saying,

> "The reformation of written *contracts* for fraud o
> mistake is an *ordinary* head of equity jurisdiction
> The rules which govern the exercise of this powe
> *are founded in good sense and are well settled. Wher
> the agreement as reduced to writing omits or contain
> terms or stipulations contrary to the common intentio
> of the parties, the instrument will be corrected so as t
> make it conform to their real intent. The parties wi
> be placed as they would have stood if the mistake ha
> not occurred.*
>
> "The party alleging the mistake must show exactl
> in what it consists and the correction that should b
> made. The evidence must be such as to leave no reason
> able doubt upon the mind of the court as to either o
> these points. The mistake must be mutual, and com
> mon to both parties to the instrument. It must appea
> that both have done what neither intended. A mistak
> on one side may be a ground for rescinding, but not fo
> reforming a contract. Where the minds of the partie
> have not met there is no contract, and hence none t
> be rectified." (Italics supplied)

The findings of the Court below, it must be borne in mind
clearly concede that a mistake was made and that the pet

tioner was not compensated for the use of its equipment but say the petitioner knew of the mistake when it entered into the contract, therefore there was no mistake, ignoring the well-settled principle that "Equity regards substance rather than form". The substance here is that the respondent has had the use of valuable machinery and has not compensated the petitioner therefor—the form is that a contract has been entered into, under protest, containing a mistake, the veil of which equity will pierce in order to get at the substance of the transaction and grant relief, either by reformation or rescission. In *Board of School Commissioners of City of Indianapolis* v. *Bender*, 36 Ind. App. 164, the Court said,

> "It is an equitable rule declared by Mr. Kent 'that he who errs is not considered as consenting' ".

Thus, when the petitioner entered into this contract, still maintaining its right to have the error corrected, it cannot be "considered as consenting" to its terms, especially in view of its written protest. The record below clearly shows exactly in what the error consists and how it should be corrected and should leave no reasonable doubt upon the mind of anyone.

While we believe that the mistake here was mutual within the meaning of the rule as reported by *Williston, supra*, and that the petitioner's case falls squarely within the illustration of the rule in the *Restatement of the Law of Contracts, supra*, and the cited cases, we call the Court's attention to the fact that the petition and arguments below sought, in the alternative, a rescission of this contract so that if the Court should believe that the mistake was unilateral it should follow the latter part of the above stated rule expressed by this Court where it says,

> "A mistake on one side may be ground for rescinding, but not for reforming, a contract."

The Court in the *Moffet* case refers to the action of the board in accepting the complainant's proposals "containing the mistakes" as "inequitable", saying,

> "It offered or forced complainant the alternative of taking the contract at an unremunerative price, or the payment of $90,000 as liquidated damages."

With respect to which the Court said, "The rule between individuals is that until a proposal be accepted it may be withdrawn * * *". That is exactly what the plaintiff in this case attempted to do but in a manner which would not endanger its equities should it need to invoke equity, realizing the maxim that "He who seeks equity must do equity" and that "He who comes into equity, must come with clean hands". But the respondent would not consent to withdrawal.

After commenting upon the charter provision of the City of Rochester, prohibiting a bidder from withdrawing after having submitted a bid, the Court stated that this was a perfectly proper provision, but quoted the language of the Court below in answer, saying:

> "The complainant is not endeavoring 'to withdraw or cancel a bid or bond.' The bill proceeds upon the theory that the bid upon which the defendants acted was not the complainant's bid; that the complainant was no more responsible for it than if it had been the result of agraphia or the mistake of a copyist or printer. In other words, that the proposal read at the meeting of the board was one which the complainant *never intended to make, and that the minds of the parties never met upon a contract based thereon. If the defendants are correct in their contention, there is absolutely no redress for a bidder for public work, no matter how aggravated or palpable his blunder. The moment his proposal is opened by the executive board he is held as in a grasp of steel. There is no remedy, no escape. If,*

through an error of his clerk, he has agreed to do work worth $1,000,000 for $10.00, he must be held to the strict letter of his contract, while equity stands by with folded hands and sees him driven into bankruptcy. The defendant's position admits of no compromise, no exception, no middle ground.'' (Italics supplied)

The Court then added its own observation, stating,

"These remarks are so apposite and just it is difficult to add to them."

We, too, believe that the remarks of the Court there are apposite in the instant case. The decision of the Court below, we respectfully submit, is in conflict with the principles laid down by this Court and the principles to which we have referred governing such cases. In fact, although we have diligently searched the reports, it would appear that the rule laid down by the Court below is entirely without precedent.

In *Edward A. Dunn* v. *P. D. O'Mara,* 70 Ill. App. 609, the question of reformation of an instrument was brought before the court of equity. In that case an erroneous estimate was made of the number of cubic yards of excavation to be accomplished under the contract, the unit cost of such work having been agreed to be 7½¢ per cubic yard. The parties agreed to 15,333-1/3 cubic yards, whereas the Court found that in truth there were only 7,666 yards to be removed. In granting reformation, the Court said,

"It matters not that the parties knew they were signing a contract in which the price was fixed at $1,150. The question is not, did the parties know what words were used, but rather do the words used express the real intention of the parties?'' (Italics supplied)

After making the above observations, the Court says:

"Where it is sought in equity to reform a written instrument *the chancellor will look beyond the question*

> *of whether the parties signing it knew and understood the exact words employed to the true intentions of the parties when they agreed upon the words. If the instrument does not express the true intention, although there was no slip of the pen or mistake made in merely writing words, the instrument will be reformed.* The mistake here consisted solely of an erroneous mathematical calculation, and authority for correcting it is abundant." (Italics supplied)

It is respectfully urged that the Court below should have looked beyond the mere signing of the contract and should have looked to the intention of both parties; that is, *the intention to furnish labor and equipment and the intention to pay and receive compensation therefor.* Full equitable weight should have been given to the fact that the plaintiff actually furnished the use of valuable equipment—which the findings of fact show were necessary to be used upon the particular job—also that the sum of $88,000 was a reasonable charge and to the fact that without equitable relief the defendant will have been enriched to the extent of that use and conversely, the plaintiff will suffer irreparable damage. The fact that full and seasonable disclosure was made to the defendant and its good faith in going ahead with the job rather than refusing to do so should also have been given its equitable consideration. The decision of the Court below is clearly in conflict with the principles of that case.

In *Board of School Commissioners of City of Indianapolis* v. *Bender, supra,* the facts involved are strikingly similar to those in the present case. The estimator there, in making up his estimate from his estimate book for the purpose of submitting his bid, by mistake turned two leaves of the book, thereby omitting an estimate on one part of the work, in consequence of which his bid as submitted was several

thousand dollars lower than he intended. The bid was accepted. After such acceptance, the bidder having discovered that a mistake had been made, notified the other contracting party that he had made a mistake and consequently did not care to go through with the contract. The Court found that the "acceptance", because there was no meeting of the minds of the parties, in equity, did not create a contract. The Court there cites the language of Mr. Justice Storey in his work on *Equity Jurisprudence* at Section 1381, who, speaking of mistakes as affecting contracts, says:

> "But where the mistake is of *so fundamental a character* that the minds of the parties have never in fact met, *or where an unconscionable advantage has been gained by mere mistakes* or misapprehension, and there was no *gross* neglect on the part of the plaintiff, either in falling into the error or in not sooner making redress, and no intervening rights have accrued, and the parties may still be placed in status quo, equity will interfere, in its discretion, *in order to prevent intolerable injustice.*" (Italics supplied.)

We submit that the mistake here is so fundamental that the minds have never met; that an unconscionable advantage has been gained by reason of the mistake, furthermore that there was no gross negligence on the part of the plaintiff, either in falling into the error or in not sooner making redress. We also contend that no intervening rights had arisen at the time the mistake was brought to the attention of the defendant. Cf. *Long* v. *Inhabitants of Athol*, 196 Mass. 497, 82 N. E. 665, and *Harran* v. *Foley*, 62 Wis. 584, 22 N. W. 837.

The decision of the Court below is not only in conflict with the foregoing but is in conflict with its own decisions in *Hygienic Fibre Co.* v. *The United States*, 59 C. Cls. 598; *Poole Engineering and Machine Company*, 58 C. Cls. 9; and

more particularly, a recent decision of that Court in *Edmund J. Rappoli Company, Inc.* v. *The United States*, 98 C. Cls. 499, which latter decision the petitioner stressed for relief. In that case the plaintiff made a mistake in its bid; it was notified on the day following opening of bids that it was the lowest bidder and upon the receipt of that communication in going over its figures discovered the error and notified the defendant, requesting that the contract be awarded as corrected. Notwithstanding the protestations of the plaintiff the contract was formally awarded on the basis of the erroneous bid and was entered into by the plaintiff, the plaintiff filing a claim with the Comptroller General, which was denied. The plaintiff sued in the Court of Claims for reformation of the contract and relief was awarded. The Court below in the instant case distinguished the *Rappoli* case on the ground that,

> "concurrently with the signing of the contract, the Government's agents promised the contractor that, upon the fulfillment of certain conditions that were found by the Court to have been fulfilled, the mistake would be corrected"

whereas, the Court said, no such promise was made here. We argued there that while hopes were held out to the plaintiff in that case that the mistake would be rectified, even as they were here, there is no finding of fact whatsoever that any such "promise" was ever made, hence the decision could not have been predicated upon that principle but rather upon the principle that a mistake had been made which justified reformation. Any such promise, if there had been one, under the principles of equity already discussed, would have been purely incidental to the awarding of relief, if, as the Court found, a mistake had been made. So that, the decision was entirely justified on the ground of mistake but not upon the ground that any promise was

made concurrently with the making of the contract that the mistake would be rectified. To hold otherwise would completely nullify the equitable relief by reformation merely by the Government's agents refusing to recognize the error and by refusing to hold out any hope of rectification in all cases where mistake has been made.

IV. Conclusion

For the foregoing reasons, it is submitted that the petition filed herewith and as a part hereof for a writ of certiorari should be granted.

Respectfully submitted,

PHIL D. MORELOCK,
902 Bowen Building,
Washington 5, D. C.,
TEMPLE W. SEAY,
902 Bowen Building,
Washington 5, D. C.,
Attorneys for Petitioner.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statement	2
Argument	6
Conclusion	13

CITATIONS

Cases:	
Board of School Commissioners of City of Indianapolis v. *Bender*, 36 Ind. App. 164	9
Board of Trustees, etc., v. *O. D. Wilson Co.*, 133 F. 2d 399	8, 9, 12
Connolly v. *Bouck*, 174 Fed. 312	12
Edmund J. Rappoli Co. v. *The United States*, 98 C. Cls. 499	10
Edward A. Dunn v. *P. D. O'Mara*, 70 Ill. App. 609	9, 10
Edwin Dougherty, etc., v. *The United States*, No. 45856, decided October 2, 1944	10
Firemen's Ins. Co. v. *Lasker*, 18 F. 2d 375	11
Ford Motor Co. v. *Pearson*, 40 F. 2d 858	12
Hawkins v. *United States*, 96 U. S. 689	9
Hearne v. *Marine Insurance Co.*, 20 Wall. 488	6, 9
Hygienic Fibre Co. v. *The United States*, 59 C. Cls. 598	10
Moffett, Hodgkins, etc. Co. v. *Rochester*, 178 U. S. 373	8, 9
Philippine Sugar, etc. Co. v. *Philippine Islands*, 247 U. S. 385	11
Poole Engineering & Machine Co. v. *The United States*, 58 C. Cls. 9	10
Miscellaneous:	
Restatement of Contracts:	
Sec. 431	11
Sec. 484	12
Sec. 491	6
Sec. 500	7
Sec. 504	6
Sec. 510	12
Restatement of Restitution:	
Sec. 68	11
Williston on Contracts (Rev. Ed., 1936):	
Sec. 15	11
Sec. 1528	11
Sec. 1606	8
Sec. 1626	11

In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 1169

THE MASSMAN CONSTRUCTION COMPANY,
PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (R. 57-62) is not yet officially reported.

JURISDICTION

The judgment of the Court of Claims was entered on January 8, 1945, and a motion for a new trial was overruled on March 5, 1945 (R. 63). The petition for a writ of certiorari was filed on April 16, 1945. The jurisdiction of this Court is invoked under Section 3 (b) of the Act

of February 13, 1925, as amended by the Act of May 22, 1939.

QUESTION PRESENTED

A bidder on a Government contract, after unsuccessfully seeking modification or withdrawal of its bid because of an alleged mistake in the bid price, thereafter, under protest, signed, executed and performed the Government's contract and accepted payment at the bid price. It thereafter brought suit in the Court of Claims seeking reformation of the contract. The question presented is whether, in these circumstances, the court below properly refused to reform this contract because of the alleged mistake in the bid price.

STATEMENT

On October 23, 1940, the United States Engineer Office, New Orleans, Louisiana, invited bids for the furnishing of labor and performance of all work to repair the existing, rubble-mound, east jetty at Calcasieu Pass, Louisiana (R. 5–10, 43). The invitation stated that the "unit price bid for each item must allow for all collateral or indirect cost connected with it" (R. 8, 44). The invitation also required bidders to execute bid bonds with each bid (R. 6, 44), the bond to become "void and of no effect" if the bidder shall "enter into a written contract with the Government, in accordance with the bid as accepted" (R. 28–29). On November 7, 1940, petitioner filed its bid in the office of the District Engineer together with a bid

bond in the amount of $200,000 (R. 28–29, 50). The bids were opened on the same day, and petitioner's bid of $367,800 was the lowest of four submitted (R. 50).

On November 20, 1940, petitioner, by letter, notified the office of the United States Engineer at New Orleans that its bid had "unintentionally failed to include in [its] total cost the value of equipment rentals which should be charged against the job;" and that such rentals "which should have been added to [the] bid totaled $88,000." Admitting that the "fault was entirely" due to its own "oversight," petitioner requested that the $88,000 cost "be added to [its] bid before the contract is awarded," or, in the alternative, that its "bid be rejected," and the "bid bond be released without penalty to either the surety company or [it]" (R. 53).[1] On December 18, 1940, the District Engineer advised petitioner that its bid of $367,800 was accepted, that "after due con-

[1] The facts underlying petitioner's "oversight," and its subsequent disclosure, are set forth in detail in the Special Findings of Fact of the court below (Findings 4–16; R. 44–53). They may be briefly summarized as follows: Petitioner's bid was estimated and submitted by petitioner's general superintendent and chief estimator, George E. Owens. While computing the costs to be taken into consideration in the submission of a bid, Owens, through inadvertence, failed to remove from his brief case the cost sheet estimating equipment rentals at $88,000 (R. 46–50), and as a consequence, the final computation of the bid did not include this amount (R. 49). After the submission of the bid, Owens became concerned over its correctness, but attributed the error, if any, to poor

sideration" petitioner's request to change its "bid is denied," but that petitioner has "the right to file a claim with the District Engineer for submission through channels to the Comptroller Gen- [petitioner's] bid" ($367,800) (R. 54–55). On the ceipt of this letter, petitioner's officers "considered the advisability of declining to enter into the contract," and "the effect of the forfeiture of its [bid] bond." Considering, however, "as one of the main factors the effect which a failure to enter into the contract might have upon its relations with the Government," the petitioner decided to sign the contract (R. 54).[2]

Thereafter, on December 28, 1940, petitioner executed the contract to "furnish the plant, labor and perform the work" in accordance with the specifications set forth in the government's advertisement for bids, and at the "prices set out in [petitioner's] bid" ($367,800) (R. 54–55). On the same day, petitioner forwarded to the District Engineer, together with the contract, a written protest stating that it was signing the contract "under protest," and "reserving all of its rights * * *

---

judgment (R. 51–52). Thereafter, the oversight was disclosed in a conference between Owens and petitioner's president and vice president (R. 52–53).

[2] The court below found that at the time petitioner executed the contract at the bid price, it "had considerable Government business and did not desire to injure its established good-will with the Government agencies with which it was dealing" (R. 54). The court also found that "During the past fifteen years," petitioner's contracts with the Government "have amounted to some $60,000,000" (R. 43).

and asking for relief on account of error and mistake in its bid" (R. 54–55). Petitioner enclosed in this letter a letter to the Comptroller General in which it prayed that "relief be given it in this matter by allowing it the reasonable rental value of said equipment so inadvertently overlooked in [its] bid" (R. 55). The District Engineer forwarded petitioner's letter to the Comptroller General (R. 55). Thereafter, petitioner's officials had conferences with the Corps of Engineers submitting affidavits and information in support of its claim (R. 55). On June 13, 1941, the Corps of Engineers forwarded petitioner's claim to the Comptroller General, finding "that there is doubt whether the [petitioner] did in fact make the mistake," that "the estimate was prepared in an extremely careless manner," that "it would not be unconscionable to require [petitioner] to perform the work at its bid price," that the "record does not establish that the [petitioner] would incur a loss in performing at the contract price," and recommending that the "claim be disallowed" (R. 55–56). The Comptroller General denied the claim (R. 56). Petitioner thereafter completely performed the contract and received payment at the contract price (R. 56).[3]

On October 15, 1942, petitioner filed a petition in the Court of Claims for "modification" of its contract with the United States "by the addition

[3] $100 was withheld from the petitioner because of its refusal to sign the final voucher (R. 56).

thereto of the sum of at least $88,000" (R. 5). That court entered judgment dismissing the petition, Judge Littleton dissenting without an opinion (R. 62–63).

ARGUMENT

It is settled law that where, because of mistake, the terms of a written contract are "materially at variance" with the intention of both parties to the contract, reformation will be allowed to reform the writing "so that it shall express the intention of the parties." *Restatement of Contracts*, § 504. In the absence of the "fraud or misrepresentation of one" of the parties to the contract (*id.* § 491),[4] the "mistake must be mutual and common to both parties to the instrument. It must appear that both have done what neither intended." *Hearne* v. *Marine Insurance Company*, 20 Wall. 488, 490–491. Following these basic principles, the court below refused reformation of petitioner's contract because there was no element of "mistake" present at the time petitioner signed its contract with the Government, for both petitioner and the Government had by then become aware of petitioner's mistake in the bid (R. 60). Petitioner contends, however, that the element of mutual "mistake" was inherent in the executed contract, since the contract "was signed under written protest, and primarily

[4] Petitioner does not contend that the Government was guilty of fraud or misrepresentation. And the mistake was not a patent one; see note 7, p. 11, *infra*.

because the petitioner realized that its failure to do so would work a forfeiture of its bid bond" (Pet. 13; see also Pet. 15, 19). We submit that the facts of this case and the applicable rules of law make these contentions untenable.

The undisputed findings of fact of the court below make it clear that there was no element of mistake—a "state of mind that is not in accord with the facts" (*Restatement of Contracts*, § 500)—present at the time the petitioner executed its contract with the United States. At that time, the alleged "oversight" (R. 53) of petitioner's chief estimator and general superintendent, George E. Owens, was known to petitioner's officers and had been made known to the Government (Findings 15–18; R. 52–54). Petitioner had sought modification or withdrawal of its bid, and the Government had "after due consideration" refused petitioner's request (Findings 16, 17; R. 53–54). With knowledge of the alleged "oversight" and the Government's position in respect thereto in mind, petitioner elected not to rescind its bid, but to sign and execute the contract with the United States at the bid price (Finding 18; R. 54). It is, therefore, clear that there was no element of mistake, either mutual or unilateral, present at the time of the signing and execution of the contract which would, of itself, now justify reformation.

Petitioner contends, however, that the "mistake" in its bid inhered in the executed contract,

since it signed that contract "primarily because the petitioner realized that its failure to do so would work a forfeiture of its bid bond" (Pet. 13).[5] This is but another way of asserting that the contract was signed under duress. But it is clear that petitioner's liability on the bid bond was litigable (*Moffet, Hodgkins, etc. Co.* v. *Rochester,* 178 U. S. 373) and may not be made a basis for imputing "inequitable conduct" to the Government (Pet. 12) or for contending that the contract was executed conditionally or under duress (Pet. 13). The courts have consistently held that where one is entitled to litigate, there is no duress or unconscionable conduct justifying rescission or reformation of the transaction allegedly induced thereby. *E. g., Board of Trustees, etc.* v. *O. D. Wilson Co.,* 133 F. 2d 399 (App. D. C.); see also cases cited in *Williston on Contracts* (Rev. Ed., 1937), § 1606. As the court

[5] It is extremely doubtful if the record will support this contention. The court below found that in "reaching a decision to sign the contract" at the bid price, petitioner "considered the effect of the forfeiture of its bond and also as one of the main factors the effect which a failure to enter into the contract might have upon its relations with the Government. At that time [petitioner] had considerable Government business and did not desire to injure its established good-will with the Government agencies with which it was dealing" (Finding 18; R. 54). The court below, in its opinion, also observed the "factor" of petitioner's "potential liability" on its bid bond "was not, apparently, the dominant one in arriving at the decision to sign. The dominant factor, it may be inferred from the testimony of [petitioner's] official, was the desire of the [petitioner] to keep the good will of its best customer" (R. 61).

below stated, the "insistence" of the Government in refusing to reject or modify petitioner's bid "put the [petitioner] in the position where it had to make up its mind whether it would be wiser to refuse to sign the contract and contest by litigation its liability on the bond, or to sign the contract, keep its reputation clear with the Government and seek relief through the discretionary action of higher officials," and did not make the Government's position unconscionable (R. 62). In other words, petitioner "simply chose to contract and perform rather than have its right to rescind [the bid] judicially determined. It is bound by the contract and cannot recover * * *" (*Board of Trustees, etc.* v. *O. D. Wilson Co.*, 133 F. 2d at p. 400). In such circumstances, it "is elementary" that "one who merely performs his contract can recover merely the contract price" (*ibid;* see also *Hawkins* v. *United States*, 96 U. S. 639).[6]

Nor did petitioner's execution of the contract "under written protest" (Pet. 13, 15, 19) because

[6] *Hearne* v. *Marine Insurance Co.*, 20 Wall. 488 (Pet. 15, 18), *Moffett, Hodgkins, etc. Co.* v. *Rochester*, 178 U. S. 373 (Pet. 15–18, 20–21), *Board of School Commissioners of City of Indianapolis* v. *Bender*, 36 Ind. App. 164 (Pet. 19, 22–23) and *Edward A. Dunn* v. *P. D. O'Mara*, 70 Ill. App. 609 (Pet. 21–22), relied upon by petitioner, are not in point. In the *Hearne* case, this Court refused reformation because the "circumstances" showed that there was "no mistake nor misapprehension" at the time the parties executed their contract (20 Wall. at p. 491). In the *Moffett* and *Board of School Commissioners* cases, it was held that one filing a bid at the

of the "mistake" in its bid price add anything to its rights to subsequent reformation, absent mutual mistake or duress. Petitioner, having chosen not to rescind its bid, conceivably voidable if made

---

invitation of a governmental agency, which bid was based on mistake, could withdraw the bid upon the discovery of the mistake, and no contracts were thereafter executed. In the *Dunn* case, the mutual mistake was disclosed after the contract was executed, and the court specifically found that the words of the contract did not express the true intention of the parties.

Petitioner's assertion (Pet. 14, 23–24) that the decision of the court below is in "conflict" with its decisions in *Hygienic Fibre Co.* v. *The United States*, 59 C. Cls. 598, *Poole Engineering & Machine Co.* v. *The United States*, 58 C. Cls. 9, *Edmund J. Rappoli Co.* v. *The United States*, 98 C. Cls. 499, and *Edwin Dougherty, etc.* v. *The United States*, No. 45856, decided October 2, 1944, is without merit. In the *Hygienic Fibre* case, reformation of a cost-plus contract was allowed, but the court specifically found that the "prices stipulated" by the parties "were not intended to be conclusive" (59 C. Cls. at pp. 607–608). In the *Poole* case, reformation was allowed because, at the time of the contract's execution, both parties to the contract understood the obligations of each thereunder to be different from those stated in the written instrument. In the *Edmund J. Rappoli* case, an allegedly erroneous bid was submitted by a Government contractor, but the contractor was persuaded by Government officers to sign the contract at the bid price on the assurance "that the mistake could be corrected by going through a routine," and that "when the routine was finished [the contractor] would receive what it was entitled to" (98 C. Cls. at p. 516). The court treated the assurance as an integral part of the contract, and reformation was made to conform to the understanding of the parties. In the *Dougherty* case, the court denied the contractor relief, stating that "upon acceptance" of the bid by the Government, the contractor "became obligated to do the work for the amount bid" (p. 11 of slip-sheet opinion).

under duress or based on a mistake of fact (*Williston on Contracts* (Rev. Ed., 1937), §§ 15, 1626), elected to contract with the United States at its bid price (Findings 18, 19; R. 54–55), and thus terminated any right to reformation thereof. See *Restatement of Contracts,* § 431 (comment g); *Williston, supra,* § 1528; cf. *Restatement of Restitution,* § 68.[7] As the court

[7] In this respect, it is significant to note that, after the opening of the bids which disclosed petitioner's to be the lowest of four submitted, petitioner's chief estimator and general superintendent, George E. Owens, conferred with the District Engineer in regard to the performance of the project. At that time, neither the District Engineer nor his assistant, both of whom were experienced estimators, regarded petitioner's bid as erroneous or unconscionably low. Indeed, the bid was not substantially different from bids submitted some sixteen months earlier for similar work in the same area (Finding 14; R. 51–52). Thereafter, neither the District Engineer, the Corps of Engineers, nor the Comptroller General found petitioner's bid unconscionable (Findings 17, 20, 21; R. 53–54, 55–56). In fact, the Corps of Engineers, after considering affidavits and supporting data submitted by petitioner, found that "there is doubt" as to whether petitioner did "in fact make the mistake" and that the "present record does not establish that [petitioner] would incur a loss in performing at the contract price" (Finding 20; R. 56). Petitioner nowhere alleges that it actually incurred a loss in executing the contract. Since it is "firmly established" that it is not sufficient to establish the facts upon which reformation of a contract is sought "by a mere preponderance of the evidence, but the proof thereof must be of the clearest and most satisfactory character—proof that is plain and convincing beyond reasonable controversy" (*Firemen's Ins. Co.* v. *Lasker*, 18 F. 2d 375, 378 (C. C. A. 8); see also *Philippine Sugar, etc. Co.* v. *Philippine Islands*, 247 U. S. 385, 391), there is substantial doubt whether the facts of this case would have even supported reformation of petitioner's

stated in *Board of Trustees, etc.* v. *O. D. Wilson Co.*, 133 F. 2d 399, 400 (App. D. C.), where, as here, the contractor executed the contract in accordance with the bid price, but " 'reserving' all rights arising from its estimator's mistake," petitioner "could not on any theory contract, perform, collect the full contract price, and then repudiate the contract and recover as if there had been none. It could not acquire such a right by purporting to 'reserve' it." To allow petitioner relief in these circumstances would, in the words of the court below, "be making for the parties the very contract which one of them, the Government, expressly refused to make * * *, though requested to do so by the [petitioner]" (R. 60).[8]

bid, had it chosen not to sign and execute the contract at the bid price. Clearly, therefore, they are not sufficient to support reformation of an executed contract, entered into after such facts were disclosed to both parties to the contract.

[8] Petitioner also argues (Pet. 19) that although it believes "the mistake here was mutual," the "petition and arguments below sought, in the alternative, a rescission of this contract so that if [this] Court should believe that the mistake was unilateral," relief should be granted in accordance with the rule that a "mistake on one side may be ground for rescinding, but not for reforming, a contract." Although the petitioner in the court below only sought "modification" of its contract with the Government (R. 5)—which can hardly be characterized as rescission—it is clear that the instant case is not one in which petitioner could seek rescission. Where a right to rescission exists, it is terminated by an election to proceed with the contract, and by an acceptance of benefits thereunder. *Ford Motor Co.* v. *Pearson*, 40 F. 2d 858, 863 (C. C. A. 9); see also *Connolly* v. *Bouck*, 174 Fed. 312 (C. C. A. 8); *Restatement of Contracts*, §§ 484, 510.

CONCLUSION

The decision below is correct and no conflict exists. It is, therefore, respectfully submitted that the petition for a writ of certiorari should be denied.

HUGH B. COX,
Acting Solicitor General.
FRANCES M. SHEA,
Assistant Attorney General.
PAUL A. SWEENEY,
JEROME H. SIMONDS,
Attorneys.

MAY 1945.

U. S. GOVERNMENT PRINTING OFFICE: 1945